IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

INCOME TAX APPEAL NO. 471 OF 2001

AND

INCOME TAX APPEAL NO. 343 OF 2001

AND

INCOME TAX APPEAL NO. 470 OF 2001

AND

INCOME TAX APPEAL NO. 518 OF 2001

AND

INCOME TAX APPEAL NO. 22 OF 2003

Date of decision: 30 September 2003

For the approval of:

Hon'ble Chief Justice S.H. Kapadia.

Hon'ble Mr. Justice Irshad Hussain.

- Whether the order/judgement should be sent to the reporters for reporting? (Yes)

- Whether the reporters be allowed to see the judgement? (Yes)

HN

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

INCOME TAX APPEAL NO. 471 OF 2001

(Old No. 07 of 2000)

The Commissioner of Income-tax, Meerut
And another ---- Appellants

Vs.

ONGC as agent of
Cooper Engineering Services Intl. Inc.
Tel Bhawan, Dehradun. ---- Respondent

AND

INCOME TAX APPEAL NO. 343 OF 2001

The Commissioner of Income-tax, Meerut
And another ---- Appellants

Vs.

ONGC as agent of
Dr. D.V. Belobon,
C/o V.V.O. Machino Import, USSR ---- Respondent

AND

INCOME TAX APPEAL NO. 470 OF 2001

The Commissioner of Income-tax, Meerut
And another ---- Appellants

Vs.

ONGC as agent of
M/S Otis Engineering Corporation,
Tel Bhawan, Dehradun. ---- Respondent

AND

INCOME TAX APPEAL NO. 518 OF 2001

The Commissioner of Income-tax, Meerut
And another ---- Appellants

Vs.

ONGC as agent of
M/s Hyundai Heavy Industrial Ltd.
Tel Bhawan, Dehradun. ---- Respondent

AND

INCOME TAX APPEAL NO. 22 OF 2003

The Commissioner of Income-tax
Dehradun and another ---- Appellants

Vs.

ONGC as agent of
Western Co. of North America,
Tel Bhawan, Dehradun. ---- Respondent

Mr. S.K. Posti, Counsel for the Appellants.
Mr. R. Muralidhar, Counsel for the respondent.

Coram: Hon'ble S.H. Kapadia, C.J.,
Hon'ble Irshad Hussain, J.

Date: 30th September, 2003:

ORAL JUDGMENT(Hon'ble S.H. Kapadia, C.J.)

1. Being aggrieved by judgment and order of ITAT (Delhi Bench), the Department has come in appeal against the order dated 12 August 1999. The appeal is filed by the Department u/s 260A of the Income Tax Act. This appeal has been filed in respect of assessment year 1990-91. This appeal No. 471 of 2001 is heard alongwith Income Tax Appeal No. 22 of 2003; ITA No. 343 of 2001,

ITA No. 470 of 2001 & ITA No. 581 OF 2001 as they raise common question of fact and law, therefore, all the appeals are heard together and disposed of by a common judgment. For the sake of convenience we are referring to the facts in ITA No. 471 of 2001.

FACTS

2. On 31 December 1990, ONGC filed a return u/s 160(1)(i) read with Sec. 163(1)(c) as agent of M/s Cooper Engineering Services International declaring a net income of Rs. 3.69 lacs. The assessee Company is a Non Resident Company. The said Company had undertaken repairs of two gas compressors on Bombay High platform. The scope of the work included design, fabrication, installation, testing and repairs. ONGC as the agent/Authorised Representative of the NRC had agreed to bear the corporate tax liability on the income of the NRC under the contract. In other words, the contract between ONGC and NRC was "Net of Tax" Contract. Since the contract was for oil exploration Sec. 44BB was applicable. Under that Section 10% of the gross receipts is deemed to be the income of NRC (assessee). This is not in dispute. However, the contract was Net of Tax. ONGC had taken over the tax liability of NRC. Therefore, the AO came to the conclusion that to the extent ONGC undertook to discharge the tax liability of NRC would amount to benefit u/s 28(iv) of the Income Tax Act. Accordingly, he added that tax component to the income of the assessee on the basis of multiple grossing. According to the AO, Sec. 44BB of the Income Tax Act did not override Sec. 28(iv) of the Income Tax Act. According to the AO, Sec. 28(iv) was a charging section. He, therefore, took the view that to the extent of the liability undertaken by ONGC to pay tax on behalf of the assessee constituted a benefit to the assessee u/s 28(iv) of the Act. Being aggrieved the assessee preferred appeal to the Commissioner of Iincome-tax(Appeals), who took the view that Sec. 44BB read with Sec. 195 did not permit multiple grossing up of income on Tax Protected Contracts. Accordingly, the appeal was

allowed. This decision of CIT(Appeals) has been confirmed by the impugned judgment of the Tribunal. Hence, the Department has come in appeal u/s 260A of the Income Tax Act as stated above.

3. Question: The following question of law is required to be answered……

> "Whether, the Tribunal was right in holding that Multiple Stage Grossing up of income was not applicable to notional income under Sec. 44BB read with Sec. 195A of the I.T. Act?"

Answer: For reasons given hereinafter we answer the above question in the affirmative i.e. in favour of the assessee and against the Department.

REASONS

4. On behalf of the Department it was argued the Sec. 44BB does not supercede Sec. 28(iv) and therefore, to the extent of the liability which ONGC had undertaken to discharge on behalf of the NRC constituted a benefit whose value should be added to the income of the assessee. It was further argued that if the contention of the assessee. Is accepted it would obliterate the difference between the Net of Tax contracts and contracts under which the NRC undertakes to discharges all its tax liabilities. In other words, it was argued, that there are two types of contracts namely Tax Protected Contracts under which ONGC agrees to pay the tax on behalf of the NRC and those Contracts under which the NRC pays tax on the consideration it receives from ONGC u/s 44BB(2). It was argued that these are two different contracts. It was argued by Mr. Posti, learned Counsel for the Department, that if the argument of the assessee is accepted then there will be no difference between the two contracts. It was further argued on behalf of the Department that Sec. 195A contemplates Multiple Stage Grossing up of income in case of Tax Protected Contracts. In this case we are concerned with tax-protected contracts. It was argued that if one reads Sec. 28(iv), Sec. 44BB and Sec. 195A it is clear that assessee was required to pay tax on the income

determined as per Multiple Stage Grossing. It was further argued that in case of Tax Protected Contracts every benefit/perquisite was taxable u/s 44BB with the help of Sec. 28(iv). It was argued that to the extent ONGC paid the tax on behalf of the NRC and to the extent that ONGC did not deduct the tax at source, the tax amount paid by ONGC on behalf of NRC constituted a benefit/perquisite under section 28(iv) and consequently, that benefit was required to be added to the income of the NRC u/s 44BB. Mr. Posti, learned Counsel for the Department further submitted that the assessee in this case has accepted its liability u/s 28(iv) at single stage but they are disputing multi stage grossing up of income which the Department has resorted to by invoking Sec. 195A. it was argued that since the NRC had accepted its liability u/s 28(iv) of the Act, may be at single stage, it is clear that Sec. 28(iv) has to be read with Sec. 44BB of the Income Tax Act Act and that Sec. 44BB does not override Sec. 28(iv) of the Act. In this connection, Mr. Posti has relied upon the judgment of the Delhi High Court in the Case of Fraink. Beaton Vs. CIT reported in 156-ITR page 16. He had also relied upon judgment of the Supreme Court in the case of Emil Webber Vs. CIT reported in 200-ITR page 483.

5. Mr. Muralidhar, learned Counsel appearing on behalf of the assessee on the other hand submitted that the concept of Multiple Stage Grossing up of income was not applicable for computing notional income u/s 44BB of the Income Tax Act. In this connection he submitted a chart in order to explain the meaning of the expression “Multiple Stage Grossing up of Income” vis-à-vis “Single Stage Grossing up of Income”. He pointed out that under Single Stage Grossing if the income of the NRC was Rs. 1000/- and the tax rate was 20%, then ONGC would bear the tax liability of Rs. 200/- for and on behalf of the NRC which would amount to benefit to the NRC and accordingly the deemed profits of the NRC which would be taxable u/s 44BB would be Rs. 1,200/- whereas according to the Department which has applied Multiple Stage Grossing up of income the benefit

to the assessee in the first instance would be Rs.200/- which in turn would be taxable at 20% amounting to Rs. 40/- which amount would be further added to the total income of Rs. 1,200/- and so on and so forth till the benefit is reduced to Zero. According to the assessee, the benefit received by the assessee, in the above example on account of ONGC paying the tax on behalf of the assessee, was only Rs. 200/- whereas according to Department which has applied Multiple Stage Grossing up of income the benefit to the assessee was Rs. 250/- (approximately). This is the only point at issue in this case. That Sec. 44BB begins with the non-obstante clause. That Sec. 44BB is a special provision which imposed tax on income derived by Non Resident Companies from oil exploration. That Sec. 44BB deals with notional income of the NRC. It inter alia stages that 10% of the gross receipts mentioned in Sec. 44BB(2) shall be deemed to be the profit of the NRC. It was argued that Sec. 44BB contemplates tax on notional income and therefore Sec. 28(iv) was not applicable. It was argued that whenever an assessee ordinarily derives income from business such income is taxable u/s 28 of the Income Tax Act. However, Sec. 44BB provides for an independent machinery to compute income earned by a NRC from oil exploration and therefore Sec. 28(iv) has no application. It was further argued that there are two types of contracts namely Tax Protected Contracts and contracts in which the NRC discharges the tax liability on its own. In the former case, the tax liability is discharged by the agent. That in the case of contracts concerning oil exploration 10% of the gross receipts computed u/s 44BB(2) is considered to be the deemed profits of the assessee. It was argued that in the case of contracts, where the NRC pays the tax on its own and not through its agent, the NRC has to pay the tax on the consideration which it receives from ONGC. That, in such an event, the assessee was required to pay tax u/s 44BB only on Rs.200/- and therefore whether one takes the contract as Tax Protected Contract or contract which is not Net of Tax, makes no difference. In both the cases the value of the benefit is only Rs. 200/-. That the Department

is wrong in applying the concept of Multiple Stage Grossing up of income to Tax Protected Contracts because whether one takes the contract as tax protected or as contracts under which tax is paid by the assessee on its own account, the benefit is constant at Rs.200/-. In the circumstances, it was argued that there is no difference between the NRC-assessee filing returns in respect of its income from oil exploration u/s 139(1) and the NRC filing its returns for such income through its agent u/s 160(1)(i) read with Sec. 163(1). It was further argued that Sec. 44BB was a code by itself and therefore it overrides Sec. 28(iv). In support of the said argument several authorities have been cited on behalf of the assessee.

6. As stated above in this appeal we are concerned with assessment year 1990-91. Sec.44BB is a special provision for computing profits and gains in connection with the business of oil exploration. It applies to Non Resident Companies engaged in such business. It begins with a Non-obstante clause. It provides for charging 10% tax on the aggregate of receipts referred to in Sec. 44BB(2). Even if the NRC makes a loss in a given year it is liable to pay tax. Therefore, Sec. 44BB provides both for chargeability of tax and computation. Therefore, it is a complete code by itself. Sec. 44BBB imposes tax on notional income and that notional income has to be computed in accordance with Sec. 44BB. Therefore, there is no need to refer to Sec. 28(iv) of the Act. Our view on this point is supported by several judgments of different High Courts [See Oil India Ltd. Vs CIT reported in 212-ITR-225(Orissa); CIT Vs ONGC reported in 255-ITR-413 (Raj); CIT Vs Schlumberger Sea Co. Inc. reported in 124-Taxman page 358(Calcutta)].

7. However, none of the above judgments cover the point at issue in this case. The main point which we are required to decide is whether, the concept of Multiple Stage Grossing up of income is applicable to the deemed profits derived by NRC u/s 44BB of the Act.

Whether, that concept can be applied by the Department to compute income falling u/s 44BB of the Income Tax Act? It was argued on behalf of the Department, that in case of Tax Protected Contracts, Sec. 195A was attracted and therefore the Department was entitled to compute the deemed profits derived by the NRC by applying the method of Multiple Stage Grossing up of income. We do not find any merit in this argument of the Department. Firstly, as stated above Sec. 44BB is a complete code by itself. It is a charging section as far as the income of the NRC is concerned from oil exploration. It deals with computation of deemed profits. Secondly, Sec. 195A comes under Chapter XVII of the Income Tax Act which deals with collection and recovery of tax whereas Sec. 44BB comes under chapter IV which deals with computation of business income. Therefore, Sec. 195A will not assist the Department in applying the concept of Multiple Stage Grossing up of income to the profits derived by the NRC from oil exploration falling under Sec. 44BB of the Act. As stated above, Sec. 44BB contemplates computation of deemed profits at 10% of the aggregate receipts received by the NRC from oil exploration. That Sec. 44BB(2) refers to items covered by Gross Receipts. In this case the assessee has computed its income by taking into account the benefit which it has received on account of ONGC paying tax on its behalf. For example, in the above illustration if applied the assessee has paid tax on Rs.200/- which is treated as its deemed profits. However, the Department has calculated that benefit at Rs.250/- by resorting to Multi Stage Grossing up of Income. This is not the case where the assessee is not paying tax on the benefit of Rs. 200/-. The dispute is only regarding the value of that benefit. According to the assessee the value of that benefit is Rs.200/- whether one takes the contract to be a Protected contract or whether one takes that contract to be not Protected. In both the cases the value of the benefit will remain constant. Therefore, there is no merit in the case of the Department. Lastly, we may point out that Sec. 195A of the Income Tax Act has no application. It is not a charging section. It

provides for recovery of tax. It provides for tax deduction at source. The fact that TDS is deductible u/s 195A from the sum payable does not mean that the contractor is assessable for that receipt. In certain cases, the contractor may not be chargeable to tax in respect of those receipts. For example, in cases where the contractor has carry forward losses or in cases where the contractor suffers losses from other contracts which are liable to be set off. Therefore, the mechanism for recovery of tax mentioned u/s 195A will not make the receipt chargeable to tax. Further, Sec. 195A is confined to incomes falling under Chapter XVII. That Sec. 195A is introduced only for the purposes of TDS. Therefore, that section cannot be applied in support of Multiple Stage Grossing up of income in respect of computation of deemed profits u/s 44BB of the Income Tax Act. In order to illustrate the above examples of the assessee deriving benefit of Rs.200/- computed as per single stage grossing up of income vis-à-vis Multiple Stage Grossing up of income we quote hereinbelow a Statement which illustrates the meaning of "Grossing up of Income", both Multi Stage and Singh Stage.

Example of Grossing Up where the tax on the personal income of the non-resident technician is to be borne by ONGC

Say the amount payable to the non-resident technician is Rs.1000 and for the sake of simplicity, the tax rate is 20%

	Stand of ONGC	**I.T. Department's Stand**
Income	1000.00	1000.00
Tax @ 20% on Rs. 1000	200.00	200.00
	1200.00	1200.00
Tax @ 20% on Rs. 200		40.00
		1200.00
Tax @ 20% on Rs. 40		8.00
		1248.00
Tax @ 20% on Rs. 8		1.60
		1249.60
		0.32
Tax @ 20% on Rs. 1.6		1249.92
Tax @ 20% on Rs. 0.32		0.08
Taxable Income	**1200.00**	**1250.00**
Tax @ 20%	**240.00**	**250.00**

8. There is one more aspect which we would like to mention before concluding this judgment. In this case we are concerned with assessment year 1990-91. However, the Department has accepted the case of the assessee for all assessment years after 1994-95.

9. For foregoing reasons, appeal is dismissed with no order as to costs.

(Irshad Hussain, J.) **(S.H. Kapadia, C.J.)**

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